Government of the District of Columbia
ZONING COMMISSION

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
NOTICE OF FINAL RULEMAKING
and
ZONING COMMISSION ORDER NO. 943-B
Z.C. Case No. 00-30TA (Part II – Combined Lot)
(Text Amendment – 11 DCMR §§ 1706 and 1708)
(Downtown Development Overlay District – Combined Lot Development, Housing Amendments)
December 10, 2001

The Zoning Commission for the District of Columbia, pursuant to its authority under § 1 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, as amended; D.C. Code, 2001 Ed. § 6-641.01 (formerly codified at D.C. Code § 5-413 (1994 Repl.))), having held a public hearing as required by § 5 of the Act (D.C. Code, 2001 Ed. § 6-641.05 (formerly codified at D.C. Code § 5-417 (1994 Repl. & 1999 Supp.))), and having referred the proposed amendment to the National Capital Planning Commission for a 30-day period of review pursuant to that same section, hereby gives notice of the adoption of the following amendments to §§ 1706 and 1708 of the Zoning Regulations, Title 11 DCMR, pertaining to combined lot development in the Downtown Development (DD) Overlay District.

Prior to these amendments, § 1706.13 prohibited the issuance of a certificate of occupancy for nonresidential uses on a lot that transferred required residential uses ("sending lot") to another lot ("receiving lot") until a certificate of occupancy was issued to the receiving lot for those required residential uses. These amendments now permit a certificate of occupancy to be issued to a sending lot notwithstanding the development status of the receiving lot, if an escrow account is funded in accordance with either of the two formulas set forth in this rule. The escrow account must be established before the filing of the combined lot covenant. The escrowed funds may be released to the parties if the required residential uses for the combined lot are built or, if under construction, at least 50% complete on the receiving lot within five years after the filing of the covenant. However, if this amount of construction is not achieved in five years, the escrowed funds will be disbursed to the District of Columbia Housing Production Trust Fund. The Commission may extend this five-year period by an additional three years if the owner of the receiving lot demonstrates good faith and due diligence in the prosecution of the work.

A Notice of Proposed Rulemaking was published in the June 8, 2001, edition of the *D.C. Register (*48 DCR 5378) for a 30-day notice and comment period. Comments were received from Holland & Knight, LLP; JPI Development Partners; Downtown Housing Now Committee; and Greenstein, DeLorme & Luchs, P.C. In addition, the Office of Planning submitted a supplemental report dated July 16, 2001, that consolidated comments made during two roundtable discussions. Among the chief concerns raised in the comments were: (1) the percentage in the formula should be lowered to assure that the amount to be escrowed will not exceed the market value of the combined lot transaction; (2) the escrowed funds should not be forfeited due to a failure to reach a construction milestone on the receiving lot, but should always remain available to the owners of that lot to assist in the development of on-site housing; and (3) the escrow should not be mandatory in all instances. Instead developers should be afforded the option of complying with the timing requirements of §1706.13 *or* establishing an escrow as an alternative to those requirements.

At its meeting on July 26, 2001, the Commission, by consensus, rejected the first two suggestions, but agreed that the proposed escrow provisions should be redrafted to clarify that the escrow is an option to compliance with § 1706.13. The Commission continued the matter to allow the Office of Planning and the Office of the Corporation Counsel to provide a revised draft that addressed this and other technical issues.

The notice of proposed rulemaking was referred to the National Capital Planning Commission (NCPC) under the terms of § 492 of the District of Columbia Charter. NCPC, by delegated action of its Executive Director dated July 11, 2001, indicated that the proposed text amendment would neither adversely affect the federal establishment or other federal interests, nor be inconsistent with the Federal Elements of the Comprehensive Plan for the National Capital, including Special Streets and Special Places, as well as adjacent federal lands and buildings.

At its meeting on September 17, 2001, the Commission took final action to adopt the amendments. Before doing so, the Commission made additional changes to the rules based upon a summary of outstanding issues provided by the Office of Planning in its supplemental report dated September 7, 2001. First, the Commission revisited concerns that the escrow formula might result in prohibitively high escrow contributions. The Commission's solution was to add a second formula that established a maximum level of escrow funding. Under this formula, the additional gross floor area achieved on the sending lot through the off-site transfer of residential uses is multiplied by $15. The escrow is to be funded in accordance with whichever formula results in a lower amount.

The Commission also agreed with the Office of Planning that the five-year period for constructing at least 50 percent of the required residential uses should run from the filing date of the combined lot development covenant. Under the proposed rule, this period would have run from the issuance of the sending lot's certificate of occupancy. Other changes clarified the Commission's intent with regard to the contents of the covenant, the manner in which escrow funds should be invested, and the procedures to be followed in the event of a default by the receiving lot.

The Commission made other changes required for consistency and clarity, including the elimination of all references in § 1708 to the transfer of bonus density. The procedures for transferring bonus density are fully addressed in § 1709. The references in § 1708.1 to the transfer of bonus density are therefore unnecessary.

Based on the above, the Commission finds that the proposed amendments to the Zoning Regulations are in the best interests of the District of Columbia, consistent with the intent and purpose of the Zoning Act and the Zoning Regulations, and not inconsistent with the Comprehensive Plan for the National Capital.

In consideration of the reasons set forth herein, the Zoning Commission hereby **APPROVES** the following amendment to §§ 1706 and 1708 of the Zoning Regulations, Title 11 DCMR. Deleted wording is shown in strike-through lettering and added wording is shown bolded and underlined. This rulemaking will become effective upon publication in the *D.C. Register*.

Chapter 17, Downtown Development Overlay District, Sections 1706 and 1708, are amended as follows:

1. Subsection 1706.13 is amended to read as follows:

1706.13 If a development project includes both nonresidential uses and required residential uses, whether on the same lot or in a combined lot development, no certificate of occupancy shall be issued for the nonresidential space~~. ; Provided:~~ until **either:**

(a) a certificate of occupancy has been issued for the residential space**; or**
~~A mixed residential-commercial project for which the Pennsylvania Avenue Development Corporation and a private developer have executed a contract requiring commencement of construction of the residential portion of the project by a date certain, may comply with the timing requirements of § 1708.1(f) instead of the timing requirements of this subsection; and~~

(b) **or an escrow account has been established and funded in a combined lot development pursuant to § 1708.2** ~~At least seventy-five percent (75%) of the commercial development that triggers the residential use requirement shall comply with the timing requirements of this subsection.~~

2. Subsection 1708.1 is amended to read as follows.

1708.1 Two (2) or more lots may be combined for the purpose of achieving the required FAR equivalent for preferred uses ~~or to transfer bonus density from one lot to one or more other lots; Provided~~ **as follows**:

(a) The lots may be located in the same square or in different squares;

(b) A combined lot development shall be eligible for the density and area allowances permitted in §§ 1703, 1704, 1705, and 1706;

(c) ~~When combined lot development involves only linkage; that is, the allocation of gross floor area required by this chapter to be devoted to preferred uses (hereinafter "linkage project"), the~~ **The** combined lot development shall be limited to lots located within the same subarea as defined in §§ 1703, 1704, 1705, and 1706, except as provided in § 1708.1(d);

(d) Notwithstanding the requirements of paragraph (c) of this subsection and of § 1706.9, a historic property that is identified and governed by § 1707.4 is eligible to serve as the location of required residential uses within a combined lot development, even if the historic properties are located outside the Housing Priority Area established in § 1706.2;

(e) ~~In a linkage project, the~~ **The** required gross floor area to be devoted to preferred uses may be transferred from the sending lot to a receiving lot, on which the required gross floor area for preferred uses shall be incorporated into the building design and occupied; provided, that any applicable ground level uses required on any affected lot shall not be transferred, but shall be provided on each sending lot and receiving lot;

(f) In a ~~linkage project~~ **combined lot development that does not include the allocation of required residential uses**, the certificate of occupancy for ~~the development~~ **a lot** sending FAR for **required** preferred uses to a receiving lot may be revoked~~,~~ if:

(1) ~~no~~ **No** building permit for the receiving lot has been issued ~~to the developer~~ within three (3) years after the issuance of the certificate of occupancy for the sending lot~~,~~**;** or

(2) ~~if no~~ **No** certificate of occupancy for the receiving lot has been issued within five (5) years after the issuance of the certificate of occupancy for the sending lot.

~~(g) When combined lot development involves a transfer of bonus density to another lot or lots, by itself or in addition to a linkage project, the density transfer may occur to any lot or lots within the DD Overlay District or in a receiving zone as provided in § 1709, except as excluded by other provisions of this chapter and title;~~

~~(h)~~**(g)** The maximum permitted gross floor area for all uses, the minimum required gross floor area for preferred uses, and bonus density, if

applicable, shall each be calculated as if the combined lots were one lot, and the total project shall conform with the maximum and minimum gross floor area requirements; ~~and~~

(h) A building constructed as of January 18, 1991, or that was under construction on that date, is not eligible to utilize the combined lot development provisions;

(i) ~~The requirements of §§ 1709.3 and 1709.10 through 1709.13 are met.~~ **No allocation of gross floor area for required uses shall be effective unless an instrument, legally sufficient to effect such a transfer, is filed with the Zoning Administrator and recorded in the land records of the District of Columbia against all lots included in the combined lot development;**

(j) The instrument shall be in the form of a declaration of covenants that:

(1) Is signed by the owners of all affected lots;

(2) Runs with the land in perpetuity;

(3) Burdens all lots involved in the allocation of gross floor area for required preferred uses;

(4) Binds the present and future owners of the lot receiving FAR to reserve, design, construct, cause to be occupied, and maintain in perpetuity an area on-site equal to the gross floor area of required preferred uses received; and

(5) States the maximum permitted gross floor areas for all uses on all lots, the minimum required gross floor areas for preferred uses on all lots, and the gross floor area allocated. The covenant shall further state that, after the transfer, the combined lots conform to the maximum and minimum gross floor area requirements on the lots.

(k) If an escrow is to be funded pursuant to § 1708.2, the covenant shall include the attachments required by § 1708.2(c) and an acknowledgment by the owner of the receiving lot, on behalf of itself and its successors and assigns that:

(1) It has voluntarily established or consented to the establishment of an escrow account;

(2) The Government of the District of Columbia will be acting in reliance upon the establishment and funding of the escrow if a certificate of occupancy is issued for nonresidential uses on the sending lot prior to the issuance of a certificate of occupancy for residential uses on the receiving lot;

(3) The attached escrow agreement requires the release of the escrow funds and any accrued interest thereon to the District of Columbia Housing Production Trust Fund, or other entity as directed by the Zoning Commission, under the circumstances stated in § 1708.5 (b); and

(4) Such a release neither negates the present or future owners' obligations under the covenant and this chapter to reserve, design, construct, cause to be occupied, and maintain in perpetuity an area on the receiving lot equal to the gross floor area of required preferred uses received nor constitutes such an extraordinary or exceptional circumstance or condition as to justify the grant of a variance from the strict application of the requirements of this chapter.

(l) The declaration of covenants shall require the owner of the receiving lot to reimburse the Government of the District of Columbia for such reasonable expenses as the District incurred to successfully enforce its rights under the declaration;

(m) The declaration of covenants shall expressly state that it may be amended or terminated only with the approval of the Zoning Commission, after public hearing and only upon a finding that the proposed modification or termination is fully justified and consistent with the purposes of this chapter; and

(n) The declaration of covenants shall be approved in content by the Zoning Administrator and certified for legal sufficiency by the Office of the Corporation Counsel. The declaration shall also contain a written statement by the Director of the D.C. Office of Planning attesting to:

(1) The lots' eligibility to allocate residential and nonresidential uses;

(2) The accuracy of the computations with respect to the amount of required preferred uses allocated; and

(3) **Whether, after the transfer, the combined lots will conform to the maximum and minimum gross floor area requirements on the lots before any such transfer.**

3. New subsections 1708.2 through 1708.6 are added.

1708.2 **In accordance with 11 DCMR § 1706.13(b), a certificate of occupancy may be issued for nonresidential uses on a sending lot or lots that allocated required residential uses to a receiving lot, without regard to the status of the receiving lot, if:**

(a) **An escrow account is established with a financial institution, including a title insurance company, that is recognized to be in good standing by the District of Columbia or other jurisdiction in which it conducts business;**

(b) **The escrow account is funded in accordance with § 1708.3; and**

(c) **The following are attached to the combined lot development covenant recorded and filed in accordance with § 1708.1 (i):**

(1) **A certification by the financial institution of the amount of funds received;**

(2) **An acknowledgment by the financial institution that the funds will be disbursed only in accordance with the mandatory escrow terms set forth in § 1708.5; and**

(3) **A copy of the agreement governing the escrow account.**

1708.3 **The escrowed funds shall be equal to the amount computed according to either the formula E = GFA (AV / LA) / NRFAR x 50%, or the formula E = GFA x $15, whichever is less. The values in these formulae shall have the following meaning:**

(a) **E = The amount deposited into escrow;**

(b) **GFA = The gross floor area of additional nonresidential uses that will be achieved on the sending lot as a result of the combined lot transfer, above that to which the sending lot would have been permitted as a matter of right, as measured in square feet;**

(c) **AV = The assessed value of the sending lot's land and improvements, as of thirty (30) days prior to the escrow**

funding date, as that value is indicated on the records of the Office of Tax and Revenue;

(d) LA = The number of square feet of land included in the sending lot;

(e) NRFAR = The permitted nonresidential FAR before the transfer; and

(f) 50% = The proportion of commercial value that has been determined to be appropriate for the escrow.

Illustration: A sending lot zoned DD/C-2-C wishes to transfer its entire residential requirement. The lot is 20,000 square feet in size. As a consequence of its DD/C-2-C zoning, the lot's permitted density is 8.0 FAR, of which at least 4.5 FAR (that is, 90,000 square feet of gross floor area) must be devoted to residential uses. The lot's assessed value, as of 30 days prior to escrow funding, was $700,000.

Based upon this scenario, the following formula values apply: GFA = 90,000 sq. ft.; AV = $700,000; LA = 20,000 sq. ft.; and NRFAR = 3.5 (8.0 - 4.5 = 3.5 of permitted nonresidential FAR).

The escrow funding would be calculated under the formula E = GFA (AV / LA) / NRFAR x 50% as follows: 90,000 sq. ft. x ($700,000 / 20,000 sq. ft.) / 3.5 x 50% = $450,000. Under the E = GFA x $15 formula, the escrow would be calculated as follows: 90,000 sq. ft. x $15 = $1,350,000. Since the result of the first formula ($450,000) is less than result of the second formula ($1,350,000), the minimum escrow funding would be $450,000.

1708.4 Escrowed funds shall be invested in investment grade securities.

1708.5 The escrow account agreement shall include terms providing that:

(a) Upon certification by the project architect to both the financial institution holding the funds and the Zoning Administrator that construction of all the residential uses required for the combined lot are at least 50% complete on the receiving lot, the funds held in the escrow account shall be disbursed in accordance with the applicable terms of the escrow agreement.

(b) If the above certification is not made within five (5) years after the filing date of the combined lot development covenant, or such further period of time as may have been permitted by the Zoning Commission pursuant to § 1708.6, escrowed funds and any accrued interest shall

be released to the District of Columbia Housing Production Trust Fund and designated for the financing of housing in the DD Overlay District in the same Housing Priority Area as the receiving lot. The escrow agent shall advise the Zoning Commission if the funds can not be released in accordance with this provision and, in that event, shall release the funds as the Commission may thereafter direct, consistent with the purposes of this chapter.

1708.6 **The owner of the receiving lot may request the Zoning Commission to allow an additional period, up to a maximum of three (3) years, to make the certification set forth in §1708.5(a). The request shall identify why the certification could not be made within the five-year (5-year) period provided and be accompanied by a timetable for construction and occupancy of the residential uses required for the combined lot. The Commission may grant the request upon a showing that the owner has proceeded with due diligence and in good faith in constructing the required residential uses.**

This proposed rulemaking was **ADOPTED** by the Zoning Commission at its public meeting on September 17, 2001, by a vote of **5-0-0** (Carol J. Mitten, John G. Parsons, Anthony J. Hood, Peter G. May, and James H. Hannaham to **ADOPT**).

Vote of the Zoning Commission taken at its public meeting on December 10, 2001, to **ADOPT** the proposed rulemaking and Zoning Commission Order 943-B: **4-0-1** (Anthony J. Hood, John G. Parsons, Carol J. Mitten, and Peter G. May to approve; James H. Hannaham, not present, not voting).

In accordance with the provisions of 11 DCMR § 3028.9, this order shall become effective upon publication in the D.C. Register; that is, on FEB - 1 2002.

CAROL J. MITTEN
Chairman
Zoning Commission

JERRILY R. KRESS, FAIA
Director
Office of Zoning